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Division II
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NO. 50212-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CARSIE TIKKA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott A. Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed in its burden to prove Mr. Tikka qualified as an "offender" for POAA sentencing purposes.

2. The trial court erred in sentencing Mr. Tikka to life in prison as a second strike persistent offender.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether a conviction for attempted child molestation in the first degree qualifies as a strike offense in two strike sentencing when the State failed to prove Mr. Tikka was an offender, meaning he was at least 18 years old when he committed the attempted child molestation?

C. STATEMENT OF THE CASE

A jury found Carsie Tikka guilty as charged of two counts of rape of a child in the first degree, one count of attempted rape of a child in the first degree, and two counts of child molestation in the first degree. RP 9 995-96; CP 42-46. Each count named GJC as the victim. CP 40-41.

At sentencing, the State acknowledged that counts 1 and 2, first degree rape of a child and first degree attempted rape of a child, respectively, were based on the same incident and double jeopardy. RP 9 1001; CP 47. Mr. Tikka asked the court to dismiss count 2 with prejudice. RP9 1002. Instead, the court dismissed count 2 without prejudice and

struck all references to it from the judgment and sentence. CP 82-83, 87-101.

The State provided the court with a sentencing memorandum alleging the offenses were subject to two strike persistent offender sentencing because of Mr. Tikka's 1999 Clark County Superior Court conviction for attempted child molestation in the first degree. CP 47-81. Sentencing paperwork appended to the memorandum included Clark County amended information 98-1-0189-3 charging Mr. Tikka with attempted child molestation in the first degree, his statement of defendant on a plea of guilty to that offense, and his judgment and sentence. CP 50-81.

The amended information for the attempted first degree child molestation listed the incident date range as June 20, 1992 to August 27, 1998, and Mr. Tikka's date of birth as January 11, 1979. CP 50-51.

Mr. Tikka agreed to the elements of the crime in the statement of defendant on a plea of guilty,

> Did take a substantial step towards the commission of the crime of Child Molestation in the First Degree, to wit: That I did in Clark County, State of Washington, between or about the 20th day of June 1992 through the 27th day of August 1998, did attempt to have sexual contact with another, to wit: S.R.K. (male, dob 6-20-96) and D.E.H. (male, dob 12-31-91), who were less than twelve

> years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

CP 56. He entered his guilty plea on June 8, 1999. CP 52.

The court entered a judgment and sentence on November 9, 1999. CP 67.

Given the charged date range chosen by the Clark County Prosecutor's Office in its amended information, Mr. Tikka was as young as 13 years old and no more than 19 years old during the single instance he attempted sexual contact with two children. CP 50-51.

At sentencing on his current offenses, based on the 1999 conviction information, the State asserted a two strike persistent offender life sentence was the only sentencing option. RP9 1004. Mr. Tikka did not object. RP9 106-07. The court imposed a life sentence. RP9 1004; CP 90.

Mr. Tikka appeals all portions of his judgment and sentence. CP 104-05.

D. ARGUMENT

Mr. Tikka's 1999 conviction for attempted child molestation in the first degree does not quality as a "strike" offense, thus, it was error to sentence him as a persistent offender.

The trial court erred in sentencing Mr. Tikka as a persistent offender under the Persistent Offender Accountability Act. RCW 9.94A.030(38). The State failed to prove he was an "offender" as required for two strike, persistent offender life-without-possibility-of-parole sentencing. Because Mr. Tikka's 1999 conviction for attempted child molestation in the first degree does not qualify as a strike offense, his "life without" sentence must be stricken.

a. The State was required to prove. Mr. Tikka was an "offender" when he was convicted of a prior most serious offense.

The State bears the burden of proving by a preponderance of the evidence that a conviction can be a strike under the Persistent Offender Accountability Act (POAA). *State v. Witherspoon*, 180 Wn.2d 875, 893, 329 P.3d 888 (2014), as corrected (Aug. 11, 2014); *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). This court reviews de novo a trial court's determination of POAA applicability. *State v. Saenz*, 175 Wn.2d 167, 172, 283 P.3d 1094 (2012); *State v. Knippling*, 166 Wn.2d 93, 98, 100-01, 206 P.3d 332 (2009). A trial court may only impose sentences that

statutes authorize. *State v. Albright*, 144 Wn. App. 566, 568, 183 P.3d 1094 (2008). A defendant may challenge a sentence contrary to law for the first time on appeal. *State v. Hood*, 196 Wn. App. 127, 138, 382 P.3d 710 (2016), *review denied*, 187 Wn.2d 1023 (2017).

Generally, to establish a person's criminal history, the State must produce a prior judgment that is not "constitutionally invalid on its face." *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986).

> A persistent offender in a POAA two strike context is a person who:
>
> (b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (38)(b)(i); and
>
> (ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection[.]

RCW 9.94A.030(38). Similarly, the State bears the burden of establishing "an applicable conviction exists." *State v. Carpenter*, 117 Wn. App. 673,

678, 72 P.3d 784 (2003) (citing *State v. Manussier*, 129 Wn.2d 652, 681-82, 921 P.2d 473 (1996), *cert denied*, 520 U.S. 1201 (1997)).

To meet this burden, the statute requires the State satisfy two separate components of proof to establish someone is a persistent offender. Taking these requirements in reverse order, the State must first prove that the prior offenses would be included in the person's offender score. *See e.g. State v. Cruz*, 139 Wn.2d 384, 190, 985 P.2d 284 (1999) (if an offense has "washed out" it cannot constitute a strike because it "would [not] be included in the offender score"). To meet this burden, *Ammons* requires nothing more than that the State produce a judgment valid on its face. Having met the burden, the State must still prove the defendant was convicted of the prior offenses "as an offender." RCW 9.94A.030(38)(a)(ii).

> "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030[1] or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110.[2]

RCW 9.94A.030(35).

[1] juvenile court exclusive jurisdiction
[2] decline of jurisdiction

The second requirement exists for the single purpose of barring the use of juvenile offenses as strikes, *State v. J.H.*, 96 Wn. App. 167, 178, 978 P.2d 1121 (1999). The SRA places no similar limitations on the use of juvenile priors in other aspects of sentencing. See e.g., RCW 9.94A.030(11) (including juvenile adjudications in definition of "conviction"); Laws of 1990, ch 3, § 706 (amending former RCW 9.94A.360 to include juvenile offenses in calculation of offender score); *State v. Johnson*, 118 Wn. App. 259, 76 P.3d 265 (2003) (juvenile priors may disqualify adult defendant from DOSA). The critical distinction between these sentencing provisions and the persistent offender provision is that the latter expressly limits its reach to prior convictions in which the defendant was an "offender," i.e., over the age of 18, properly declined, or subject to automatic decline.

b. <u>The State did not prove Mr. Tikka was an "offender" at the time of the 1999 attempted child molestation in the first degree</u>.

It is not the defendant's burden to disprove the State's sentencing allegations where the State has failed to support them with competent proof. *Ford*, 137 Wn.2d at 482. Assuming the State presented sufficient evidence that Mr. Tikka's 1999 offense should be included in his offender score, i.e., produced a judgment which was not invalid on its face, the State presented no evidence to establish Mr. Tikka was an "offender" under the

1999 conviction which specified a date range of June 20, 1992 to August 27, 1998, during which time Mr. Tikka's age ranged from a youthful 13 to a slightly more mature 19. CP 52.

To meet its burden the State was required to prove that when the attempted child molest occurred, Mr. Tikka was (1) at least 18 years of age; (2) charged and convicted of an offense for which the Superior Court had jurisdiction under RCW 13.04.030; or (3) the juvenile court had properly declined jurisdiction. RCW 9.94A.030(35). The State proved none of these requirements. The judgment which the State offered specified Mr. Tikka's age as somewhere between 13 and 19 years old. CP 52. The judgment was for attempted child molestation in the first degree, an offense for which a decline hearing is necessary when the offender is under 18. The State offered no additional proof that Mr. Tikka qualified as an offender when committing the attempted child molestation.

The State must have misunderstood the requirements of RCW 9.94A.030 defining a persistent offender and failed to appreciate the burden it must carry. Mr. Tikka could easily have been 13 to 17 years old during the 2,259 day charging period specified in the amended information. CP 50-51. In fact, he was less than 18 years-old for 1,666 days – or 73.75% of the time – covered by the information. Such an expansive

window of time to address "an act" of attempted sexual contact with two children tells us the prosecutor had little confidence as to when the act actually occurred. The State should not now be allowed to capitalize on its lack of confidence in the date of the alleged first strike, to now allow it to "strike out" a person when they cannot prove Mr. Tikka was other than a child himself when the "strike" act occurred.

In persistent offender two strike sentencing, age of the accused at the time of the first offense matters. The State failed to meet its burden of proving Mr. Tikka was 18 years-old at the when he committed the first strike offense. With proof lacking, the two strike persistent offender characterization should be stricken and Mr. Tikka remanded for resentencing.

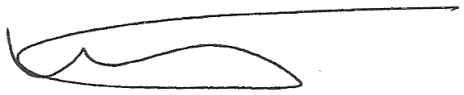
c. The proper remedy for the State's failure to prove a defendant is a persistent offender is to sentence the person within the standard range.

Where, after the opportunity to do so, the State fails to offer sufficient proof that a person is a persistent offender the State will not be afforded another opportunity to do so. *State v. Lopez*, 147 Wn.2d 515, 520, 55 P.3d 609 (2002).

E. CONCLUSION

Mr. Tikka's persistent offender life sentence should be reversed and his case remanded to the trial court for resentencing.

Respectfully submitted January 18, 2018.



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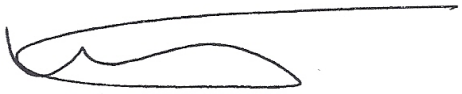
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Brief of Appellant to (1) Clark County Prosecutor's Office, at cntypa.generaldelivery@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Carsie Tikka, DOC#797282, Washington State Penitentiary, 1313 North 13th Avenue Walla Walla, WA 99362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 18, 2018, in Winthrop, Washington.



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